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FIBER TECHNOLOGIES NETWORKS, L.L.C.	)	
140 Allens Creek Road	)	
Rochester, NY 14618	)	
	)	
Complainant,	)	
	)	
v.	)	D.T.E. 01-70
	)	
TOWN OF SHREWSBURY ELECTRIC	)	
LIGHT PLANT	)	
100 Maple Avenue	)	
Shrewsbury, MA 01545-5398	)	
	)	
Respondents.	)	
	)	

Pursuant to 220 C.M.R. 1.06(6)(c)(4) Fiber Technologies Networks, L.L.C. (“Fibertech”) moves that the Department of Telecommunications and Energy (“Department” or “DTE”) compel Shrewsbury’s Electric Light Plant (“SELP”) to respond to the information requests set out below.

SELP has ignored well-established law and refused to produce a legal opinion prepared for SELP, even though SELP is subject to the Public Records Act and has disclosed such information it claims is privileged to third parties and in discovery. SELP claims that the responsive records are shielded from disclosure either by the attorney-client privilege, the attorney work-product doctrine, or by exemptions to the Public Records Act. As set forth more fully below, none of these grounds have merit. Because the documents requested do not fall

within any exemption to the Public Records Act and, for independent reasons, are not shielded by the attorney-client privilege or the attorney work-product doctrine.

## **BACKGROUND**

SELP's defense in this case rests on the premise that a dark fiber provider is per se not a licensee within the meaning of G.L. c. 166 § 25A. On October 29, 2001, Fibertech submitted its first set of information requests to SELP seeking documents concerning SELP's communications with any parties regarding Fibertech. Two of the documents Fibertech received in response specifically disclose information as to which SELP claims privilege. A memorandum from T.R. Josie to the Light Commission dated October 16, 2000 refers to a "legal opinion" by "K. Barna" "that stated since Fiber Systems is not a telecommunications provider or CATV company, SELP has no legal obligation to rent space to them." Another memorandum from T.R. Josie to D. Morgado and J. LeBeaux dated May 15, 2001, also refers to "an opinion from counsel stating that this fiber company, Fibertech, does not meet the Department of Telecommunications & Energy (DTE) criteria to mandate attachments from SELP" and offering to make available the services of SELP counsel. (These documents are attached as Attachments A and B respectively). In light of these disclosures, on November 13, 2001, Fibertech filed a second set of information requests specifically seeking the legal opinion(s), the substance of which was described in these documents. On November 21, 2001, SELP responded, again asserting the attorney-client privilege, the work product doctrine, and exemptions under the Public Records Act:

*FIBERTECH 2-1: Please state whether Thomas Josie or any board member or employee of SELP made any communications regarding Fibertech via email. If so, please produce such communications.*

*RESPONSE: Yes. SELP produced all non-privileged, public documents responsive to this request in response to Fibertech 1-1.*

*FIBERTECH 2-2: Refer to the documents produced in SELP Response to Fibertech 1-1.*

...

*c. Please produce the legal opinion by K. Barna referred to in the Memorandum from T.R. Josie to the Light Commission dated October 16, 2000.*

*d. Please produce the research by K. Barna referred to in the memorandum from T.R. Josie to D. Morgado and J. LeBeaux dated May 15, 2001, and the "[a]dditional back-up information" referred to on the third page of such memorandum as attached.*

*RESPONSE:*

...

*c. SELP objects to this request on the grounds that it has already been asked and answered. See Response to Fibertech 1-1.<sup>1</sup> Again, SELP objects to this request on the grounds that it calls for the production of documents protected by the attorney-client privilege, and the attorney work-product doctrine and exempt from disclosure under public records laws.*

*d. Please refer to SELP's response to Fibertech 2-2c. Without waiving this objection, SELP agrees to produce all non-privileged, public documents responsive to this request.*

Then, on November 16, 2001, Fibertech received from SELP the Prepared Direct Testimony of Thomas R. Josie. Mr. Josie's testimony referred to action he took after "obtaining the opinion of SELP's counsel" and a letter he prepared "on the advice of counsel."<sup>2</sup> Based on the above-mentioned responses by Mr. Josie, Fibertech prepared a third set of information requests seeking Barna's opinion and any documents reflecting or referring to the advice of counsel referred to by Mr. Josie. The requests are as follows:

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<sup>1</sup> On November 8, 2001, SELP responded as follows:

*Fibertech 1-1: Please produce all documents referring to relating to Fibertech in the possession of SELP, including but not limited to communications with the Town or any other parties regarding Fibertech.*

*Response: We are not producing documents protected by the attorney-client privilege, the work product doctrine or documents exempt from disclosure under the public records laws. All other documents will be provided. Please note that copies of pleadings and correspondence to and from the DTE in this case have not been produced.*

<sup>2</sup> *Prepared Direct Testimony of Thomas R. Josie on Behalf of Shrewsbury's Electric Light Plant* at pp. 3, 8 (filed Nov. 16, 2001).

*Fibertech 3-4: Refer to page 3, lines 10 through 18 of the Josie Testimony.*

*(b) Please produce the opinion of SELP's counsel referred to, and state whether such opinion has been furnished to (1) the Town of Shrewsbury or any of its employees or agents, (2) any other municipal light department, and (3) any other person not employed by SELP.*

*Fibertech 3-9: Please refer to page 8, line 6 of the Josie Testimony.*

*(a) Please produce any documents reflecting or referring to the advice of counsel referred to.*

*(b) Please state whether such advice has been furnished in any form to (1) the Town of Shrewsbury or any of its employees or agents, (2) any other municipal light department, and (3) any other person not employed by SELP.*

Counsel for SELP has stipulated that SELP will raise objections similar to those set forth above to these further requests, so Fibertech includes them in this motion.

## **ARGUMENT**

Public records are subject to mandatory disclosure. G.L. c 66, §10(b). SELP is subject to the Public Records Act. *See* G.L. ch. 164 § 47D (defining “only ... instances” where light plants are exempt from the Public Records Act). Therefore, the statute is clear that as a general matter, light plants are subject to the Public Records Act. The Public Records Act establishes “a presumption that the record sought is public,” and places the burden on the custodian of the record “to prove with specificity the exemption which applies.” G.L. c. 66, §10(c). The documents requested by Fibertech were papers received by Thomas R. Josie, General Manager of SELP.<sup>3</sup> Therefore, the documents requested by Fibertech are public records and must be produced. They are not shielded by attorney-client or work product privilege because these

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<sup>3</sup> The Supervisor of Public Records – the office charged with the administration of the Public Records Act – has stated that “[b]y enacting the current definition of ‘public records,’ the Legislature unequivocally decided that ***all documentary materials or data made or received by a public employee constitute public records***, unless one of the strictly and narrowly construed exemptions applies.” (emphasis added). *Letter Determination of the Supervisor of Public Records* SPR97/223, at 12; *see also* SPR96/010 (“enactment of the Public Records Law effects an abrogation of that part of the privilege encompassing governmental documentary materials to which no exemption applies”).

doctrines do not override the Public Record Act and because SELP has already waived any such privilege by disclosing the purportedly privileged information.

**I. THE PUBLIC RECORDS ACT REQUIRES SELP TO DISCLOSE THE REQUESTED DOCUMENTS.**

**A. THERE IS NO ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT EXEMPTION TO THE PUBLIC RECORDS ACT.**

The Supreme Judicial Court has stated unequivocally that “the [public records] statute’s clear and unambiguous language mandates disclosure of requested public records limited only by the definition of public record found in G.L. c. 4, §7, Twenty-sixth.” and that the Public Records Act is “subject only to limited exceptions” that “must be strictly and narrowly construed.”

*General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798, 801-02.

Neither the attorney-client privilege nor the work product doctrine are among the enumerated exemptions to the Public Records Act, therefore, the documents cannot be shielded from production under the two privilege theories.

The well-settled principle of statutory construction that “where a statute provides a number of express exceptions, no other exceptions should be implied,” compels the conclusion that the attorney-client privilege does not apply to the requested documents. *1010 Memorial Drive Tenants Corp. v. Fire Chief of Cambridge*, 424 Mass. 661, 667 (1997). “[S]ince the attorney-client privilege is not expressly incorporated into any of the enumerated exemptions to the [Public Records Law] it cannot be read in.” *Kent v. Commonwealth*, No. 982693, 2000 WL 1473124, at \*4 (Mass. Super. July 27, 2000)(Botsford, J.). See *District Attorney for the Plymouth Dist. v. Board of Selectmen of Middleborough*, 395 Mass. 629, 633 (1985) (“Exceptions are not to be implied. Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied.”) (quoting 2A

C. Sands, Sutherland Statutory Construction § 47.11 (4th ed.1984)). Neither does the work product doctrine shield the requested documents. In *General Electric Co.*, the court held, “[m]aterials privileged as work product pursuant to the rule of civil procedure are not protected from disclosure under the public records statute, unless those materials fall within the scope of an express statutory exemption.” *General Elec. Co.*, 429 Mass. at 799. Traditional common law privileges, such as the work product doctrine, do not apply to the Public Records Act because “the statute’s clear and unambiguous language mandates disclosure of requested public records limited only by the definition of public records found in G.L. c. 4, §7, Twenty-sixth.” *Id.* at 802 (emphasis added). Because the opinion(s) provided to SELP is a public record, there is no basis for SELP’s claims of attorney-client or work product privileges.

**B. PUBLIC RECORDS ACT EXEMPTIONS DO NOT APPLY TO THE REQUESTED DOCUMENTS.**

SELP does not specifically set forth which of the Public Records Act exemptions it is claiming. The Public Records Act exemptions for privacy, personal information, criminal records, police investigations, medical records, trade secrets, proposals and bids, appraisals, firearm licenses, test questions and answers, and court records clearly do not apply to this case. The only other exemption is the “policy deliberation” exception (“Exemption (d)”). It, too, does not apply here.

Exemption (d) exempts from the mandatory disclosure requirements “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency....” G.L. c. 4, §7, cl.26(d). First, any policy positions by SELP are no longer “being developed.” They have been formulated and implemented. Second, SELP is not a policymaking body. Operationally, a light department is governed by G.L. ch. 164, which governs commercial businesses, rather than G.L. ch. 44, which governs municipal departments. *See Municipal Light*

*Commission v. City of Peabody*, 348 Mass. 266, 273 (1964). Under G.L. ch. 164, SELP is not delegated any decisionmaking authority in the public interest; rather it constructs, maintains, and operates the light plant. In this context, the legal opinion(s) was sought to make an operational decision in response to Fibertech's request to attach to SELP's poles, not to develop policy with respect to a governmental decision. Therefore, Exemption (d) does not apply to the requested documents, and the documents must be produced.

## **II. SELP HAS WAIVED ANY PRIVILEGE BY DISCLOSING THE SUBSTANCE OF THE LEGAL OPINION VOLUNTARILY.**

The attorney-client privilege and work-product doctrine are to be "strictly construed," and the proponent of the privilege bears the burden of proving not only that the privilege or work product protection applies to a given communication or document, but that the privilege or work product protection has not been waived. *In re Reorganization of Elec. Mut. Liab. Ins. Co.*, 425 Mass. 419, 421-22 (1997); *Commerce & Indus. Ins. Co. v. E.I. Du Pont De Nemours and Co.*, No. 98-2266, 2000 WL 33223235, at \*2 (Mass. Super. December 11, 2000). Here, SELP has waived any privilege applicable to the Barna legal opinion by disclosing the substance of that opinion, first to the Town of Shrewsbury, and then to Fibertech in information request responses, and by placing the opinion at issue through the testimony of Thomas R. Josie.

### **A. SELP HAS WAIVED ITS ATTORNEY-CLIENT PRIVILEGE CLAIM AND ITS WORK-PRODUCT PRIVILEGE CLAIM BY VOLUNTARILY DISCLOSING THE LEGAL OPINION TO A THIRD PARTY.**

Voluntary disclosure of a protected communication to a third party constitutes a waiver of the attorney-client privilege with respect to that document. *In re Reorganization of Elec. Mut. Liab. Ins. Co, Ltd.*, 425 Mass. at 423 & n.4; see *Colonial Gas Co. & Aetna Cas. & Sur. Co.*, 144 F.R.D. 600, 604 (D. Mass. 1992) ("Voluntary disclosure to an outside party generally waives the privilege."); see also *Drew v. Drew*, 250 Mass. 41, 45 (1924) (attorney-client privilege destroyed

where wife showed letter written to her attorney to both husband and husband's attorney). Similarly, voluntary disclosure of an attorney's work product "would indicate that [he or she] had waived any work-product privilege." *Adoption of Sherry*, 2001 WL 1402149 (Mass. November 13, 2001) (publication page references are not available for this document); *see also United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 687 (1<sup>st</sup> Cir. 1997) (holding disclosure of documents to an agency, a potential adversary, forfeited work product protection).

Here, SELP voluntarily disclosed the substance of the legal opinion to the Town. See Attachment B. The Town is a third party because it is a separate and "distinct" entity from the light plant. *Town of Middleborough v. Middleborough Gas & Electric Dept.*, 422 Mass. 583, 588 (1996) (holding a municipality and a municipal light plant are "sufficiently distinct as financial and political entities" that a town can sue its light plant); *see also Municipal Light Comm'n v. City of Peabody*, 348 Mass. 266, 273 (1964). Therefore, by voluntarily disclosing the legal opinion of its counsel to a third party, SELP waived any attorney-client privilege and work product protection that may have attached to the document.

SELP again disclosed the substance of the opinion when it produced copies not only of Mr. Josie's memorandum to the Town of Shrewsbury, but also his memorandum to the Board of SELP summarizing the opinion. See Attachment A. Since the substance of the documents that was produced to the Town is the same as that produced to Fibertech during discovery, "basic fairness dictates" that SELP be compelled to produce the legal opinion and related documents. *Investigation by D.T.E. into Boston Edison Company's compliance with the Department's Order in D.P.U. 93-97*, D.T.E. 97-95, Hearing Officer Ruling at 6-7 (November 17, 1998); *see also AMCA Int'l Corp. v. Phiphard*, 107 F.R.D. 39, 42 (D. Mass. 1985) ("serious questions of fairness



arise especially when a party makes statements . . . to secure a benefit while denying his opponent, under a claim of privilege, the opportunity to contradict those statements”).

These disclosures strip away the foundation of any claim of privilege. The attorney-client privilege applies to a “communication expressly intended to be confidential.” *Ploof v. Cornu-Schaab Properties, Inc.*, No. 911403, 1993 WL 818733, at \*3 (Mass. Super. November 4, 1993). Communications intended to be conveyed to third parties do not fall within the privilege’s ambit. *Id.*; see *Peters v. Wallach*, 366 Mass. 622, 627 (1975) (“communications between an attorney and client are not privileged, though made privately, if it is understood that the information communicated is to be conveyed to others”). Likewise, the work product privilege applies in a situation where “a party claiming the privilege had a reasonable basis for believing that the disclosed materials would be kept confidential.” *In re Atlantic Financial Management Securities Litigation*, 121 F.R.D. 141, 144 (D. Mass. 1988). Here, SELP cannot claim reasonable expectation of confidentiality when it voluntarily disclosed the substance of its attorney’s advice to the Town, and it consequently waived any privilege that may have attached to the document.

Fibertech is entitled to any other documents reflecting or referring to the advice of counsel on the ground that SELP waived any attorney-client privilege it may have had when it disclosed its attorney’s legal opinion to the Town. See *Ploof*, 1993 WL 818733, at \*5; see *In re Grand Jury Subpoena (Zeredow)*, 945 F. Supp. 849, 855 (D. Mass. 1995) (“Waiver of the privilege in an attorney-client communication extends to all other communications relating to the same subject matter.”)

**B. SELP HAS WAIVED ITS ATTORNEY-CLIENT PRIVILEGE CLAIM AND ITS WORK-PRODUCT PRIVILEGE CLAIM BY PLACING THE SUBJECT MATTER OF LEGAL ADVICE “AT ISSUE” IN THIS CASE.**

SELP has waived any attorney-client privilege and work product protection that may have attached to the legal opinion and related documents by placing the subject matter of legal advice at issue in this case. A litigant may implicitly waive the attorney-client privilege by “injecting certain claims or defenses into a case,” which is the “basic premise underlying the concept of ‘at issue’ waiver.” *Darius v. City of Boston*, 433 Mass. 274, 277-78 (2001). The “at issue” doctrine applies and a party implicitly waives its privileges where: “‘(1) assertion of the privilege was a result of some affirmative act, such as filing a suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.’” *Id.* at 278 (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)); *Ploof*, 1993 WL 818733, at \*3. Information is “vital” if the information is not available from any other source. *Darius*, 433 Mass. at 284; *Dedham-Westwood Water Dist. v. National Union Fire Ins. Co.*, No. CIV.A. 96-00044, 2000 WL 33419021, at \*6 (Mass. Super. February 4, 2000).

Moreover, if asserted, SELP cannot prevail on an “advice of counsel” defense. When a party asserts an advice of counsel defense, “it waives the attorney-client privilege with respect to ‘all communications to and from counsel concerning the transaction for which counsel’s advice was sought.’” *Saint-Gobain/Norton Indus. Ceramics Corp. v. General Elec. Co.*, 884 F. Supp. 31, 33 (D. Mass. 1995) (quoting *Kelsey-Hayes Co. v. Motor Wheel Corp.*, 155 F.R.D. 170, 171-72 (W.D. Mich. 1991)); *see also Nitinol Medical Technologies, Inc. v. AGA Medical Corp.*, 135 F. Supp.2d 212, 215 (D. Mass. 2000) (“Deliberate injection of the advice of counsel into a case

waives the attorney-client privilege.”) It would be “fundamentally unfair to allow a party to disclose opinions which support its position, and simultaneously conceal those which are adverse.” *Saint-Gobain*, 884 F. Supp. at 33.

An assertion of the “advice of counsel” defense also results in a waiver of work product protection. *Id.*; *Nitinol Medical Technologies, Inc.*, 135 F.Supp.2d at 215; *Micron Separations, Inc. v. Pall Corp.*, 159 F.R.D. 361, 363 (D. Mass. 1995). Such a waiver extends to opinion work product when mental impressions are at issue in the case and the need for the material is compelling. *Holmgren v. State Farm Mutual Automobile Ins. Co.*, 976 F.2d 573, 577 (9<sup>th</sup> Cir. 1992); *see also Coleco Indust., Inc. v. Universal City Studios*, 110 F.R.D. 688, 690 (S.D.N.Y. 1986) (“A consistent line of cases has developed an exception to the work product privilege where a party raises an issue which depends upon an evaluation of the legal theories, opinions and conclusions of counsel.”)

In this case, SELP has directly placed its attorney’s advice, not only at issue, but made it *the* issue in the litigation. The information sought is both vital and necessary to Fibertech’s defense of its claim against SELP because it goes to the basis for SELP’s denial of access to its poles, and is not available from another source. Consequently, SELP should be compelled to produce the legal opinion and other related documents because important information will be unavailable if the privilege prevails. *See Ploof*, 1993 WL 818733, at \*5 (“Fairness requires that the privilege be deemed waived where it will diminish, in a meaningful way, [a party’s] ability to defend the instant action.”).

## CONCLUSION

SELP has fallen far short of its burden to prove with specificity the exemption which applies to justify withholding requested public records or its burden to show it has not waived

privilege if any applied to these public records. The Department should therefore order SELP to produce the public records requested and to respond completely to the above-listed information requests.

Fibertech respectfully seeks expedited treatment this motion by the Department in order to prevent jeopardizing the existing procedural schedule in this case.

Respectfully submitted,

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Dated: November 28, 2001

**CERTIFICATE OF COMPLIANCE**

I, Cameron F. Kerry, counsel for Fiber Technologies Networks, L.L.C., do hereby certify that on November 26, 2001, I had a telephone conference with Diedre T. Lawrence, counsel of record for Shrewsbury's Electric Light Plant, for the purpose of attempting to narrow areas of disagreement on discovery matter, and that, despite the good faith efforts of the parties, no resolution has been reached as of the date of this motion.

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Cameron F. Kerry